

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

In the Matter of )

Amendment of the Commission's Rules )

Regarding Installment Payment Financing for )

Personal Communications Services (PCS) )

Licensees )

WT Docket No. 97-82

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**COMMENTS OF NEXTWAVE**

NextWave Personal Communications Inc. and NextWave Power Partners Inc. (collectively "NextWave") hereby submit Comments in the above captioned proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

Under Section 309(j) of the Communications Act of 1934 ("Act"), as amended, the Commission's licensing policies should be guided by three overarching principles: (1) rapid deployment of service; (2) increased competition in wireless communications services; and (3) efficient assignment of spectrum.<sup>2</sup> At least on the surface, the Commission agrees with this statutory mandate, stating in the Notice that it has sought "to provide meaningful opportunities to small businesses, to speed the deployment and development of new services to the public, to encourage the efficient use of spectrum, and to recover for the public a portion of the value of

<sup>1</sup> Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, Further Notice of Proposed Rulemaking, FCC 00-197 (rel. June 7, 2000) ("Notice").

<sup>2</sup> 47 U.S.C. § 309(j); see Notice at ¶ 5.

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spectrum."<sup>3</sup> The proposed reauction of C and F block spectrum, however, fails to satisfy these commitments in any meaningful way. Instead, the Commission has tentatively concluded to proceed in haste to auction licenses currently surrounded by uncertainty. Doing so will materially affect the outcome of the auction, as well as the provision of service to all Americans.

Glaringly absent from the Notice is any reference to the ongoing litigation that surrounds a significant number of the licenses the Commission proposes to reauction.<sup>4</sup> Indeed, more than half of the licenses are subject to a certiorari petition to the United States Supreme Court, and to judicial review of agency action in the United States Court of Appeals for the District of Columbia Circuit.<sup>5</sup> The uncertainty that necessarily results from the pending appeals is enormous. Common sense and basic auction principles instruct that such uncertainty will have a materially negative impact on the proposed reauction. The Commission's failure to even mention any of this in the Notice is inexplicable.

Proceeding under the present cloud of uncertainty runs counter to Congress' mandate in the Act and to sound public policy decision making. Nevertheless, it is not NextWave's purpose here to request a stay of the auction. That issue is fully and properly pending before the U.S. Court of Appeals for the District of Columbia Circuit, as part of NextWave's request that the

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<sup>3</sup> Notice at ¶ 25.

<sup>4</sup> Indeed, the Commission's proposed reauction of NextWave's licenses is unlawful because the purported cancellation of those licenses was unlawful. NextWave incorporates by reference into this proceeding its petition for reconsideration of the license cancellation. Purported Cancellation of Spectrum Licenses for Personal Communications Services Allocated to NextWave Personal Communications Inc. and NextWave Power Partners Inc., Petition for Reconsideration (filed Feb. 11, 2000).

<sup>5</sup> In re NextWave Personal Communications, Inc., 200 F.3d 43 (2d Cir. 1999), petition for cert. filed (U.S. June 9, 2000); NextWave Personal Communications Inc. and NextWave Power Partners Inc. v. F.C.C., Nos. 00-1045, 00-1046 (D.C. Cir. filed Feb. 11, 2000).

court expedite consideration of NextWave's challenge to the lawfulness of the Commission's purported cancellation of the company's PCS licenses. Rather, the goal of this filing is to contribute to building an adequate record on the relationship of the pending litigation to the Commission's proposals. Such a record is necessary to allow for reasoned decision making by the Commission and the public.<sup>6</sup>

NextWave will demonstrate herein that, due to litigation uncertainty, implementing the proposed rule modifications and tentative auction schedule will have pronounced deleterious effects, without any offsetting public benefit. Proceeding with the auction under such conditions will not ensure the rapid deployment of additional wireless services to consumers. Instead, successful bidders are likely to defer making any significant investments in their markets until their rights are settled.

The Commission should address in this proceeding the direct effects of uncertainty on bidder behavior in an auction setting, as well as the indirect effects on bidders' financial relationships, and should communicate the potentially hazardous financial implications of these effects to parties considering participating in reauctions held during the pendency of appellate proceedings. In particular, the Commission should explain why it is rational to proceed with the auction rather than wait until the litigation is resolved in court or settled.

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<sup>6</sup> See generally 47 U.S.C. § 309(j)(3)(E)(ii) (requiring the Commission to ensure that potential auction participants "have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services." Clearly encompassed within this requirement is the full disclosure of all relevant information by the Commission.).

**II. THE PROPOSED REAUTION RAISES SIGNIFICANT PUBLIC POLICY CONSIDERATIONS THAT AFFECT EFFICIENT SPECTRUM ASSIGNMENT AND THE DEPLOYMENT OF COMPETITIVE SERVICES.**

**A. Different Parcels Of Spectrum Will Expose Bidders To Variable Risks, With Parcels Under Appeal Presenting The Highest Degree Of Uncertainty.**

The uncertainty created by the pending appeals will complicate a reaution because potential providers are likely to appraise their interest in providing service, at least in part, based upon plans to aggregate multiple parcels of spectrum. The contingent nature of any reaution under current circumstances, however, will severely frustrate such plans. At a minimum, conducting the auction under those circumstances will generate inconsistent and inefficient auction outcomes.

Throughout its auction proceedings, the Commission has acknowledged that many auction participants formulate bids on a particular spectrum license based on their private valuation of that license as “packaged” or “combined” with other licenses. In fact, the Commission is considering adopting a system of combinatorial (package) bidding in the 700 MHz auction as one way to decrease the risk of such bids.<sup>7</sup> As the Commission so clearly states in its recent Public Notice seeking comment on the use of package bidding in the 700 MHz auction:

This approach would allow bidders to better express the value of any synergies (benefits from combining complementary items) that may exist among licenses, and to avoid *exposure problems* — the risks bidders face in trying to acquire efficient packages of licenses. For example, with package bidding a bidder desiring an aggregation of all six [30] MHz licenses in order to inaugurate a nationwide service could bid on the six licenses as a package and not face the risk of winning only some of the desired licenses and paying

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<sup>7</sup> Auction of Licenses in the 747-762 and 777-792 MHz Bands Scheduled for September 6, 2000: Comment Sought on Modifying the Simultaneous Multiple Round Auction Design to Allow Combinatorial (Package) Bidding, *Public Notice*, DA00-1075 (rel. May 18, 2000).

more than the bidder values those licenses by themselves (without the other licenses needed to provide nationwide coverage).<sup>8</sup>

Moving forward with the auction proposed in the Notice, however, carries with it substantial risk that some licenses obtained as a result of a “packaged” bid will subsequently be nullified by judicial decree. This prospect may result in a delayed and inefficient use of the spectrum. Such an outcome would contravene several goals of section 309 of the Act, including:

- “[T]he development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;”<sup>9</sup> and
- “[E]fficient and intensive use of the electromagnetic spectrum.”<sup>10</sup>

Obviously, conducting an auction under an enormous litigation cloud makes the foundation of any bidder’s evaluations less definitive, and consequently, increases the likelihood of serious and costly disruptions of high bidders’ expectations.

**B. The Proposed Subdivision Of Spectrum Into Tiers Will Frustrate The Pro-Competitive Goals Of The Act And Is Based On An Erroneous Rationale.**

The Commission proposes to reconfigure each 30 MHz C block license into three separate 10 MHz licenses. The record suggests that certain interested parties favor such reconfiguration since it would allow them to participate in future C block auctions without being restrained by CMRS spectrum cap concerns.<sup>11</sup> The Commission also proposes to apply a new

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<sup>8</sup> Id. at 2 (emphasis in original).

<sup>9</sup> 47 U.S.C. § 309(j)(3)(A).

<sup>10</sup> Id. § 309(j)(3)(D).

<sup>11</sup> See Notice at ¶ 15.

tiered approach to Basic Trading Areas ("BTAs") -- Tier 1 comprises BTAs at and above a 2.5 million population threshold and Tier 2 comprises BTAs below that threshold.

The Commission should reassess its stated rationale for the proposed tier system, as it appears highly suspect. In drafting a regime which encourages smaller bidders to purchase licenses primarily in smaller markets, the Commission concludes that "[m]arkets with larger populations inevitably require more capital to build out and provide service."<sup>12</sup> This attempt to justify relegating entrepreneurs primarily to Tier 2 markets is flawed in that it addresses only the cost side of the equation, while completely ignoring the revenue side. Both Tier 1 and Tier 2 market infrastructures require a very high fixed-cost investment, but Tier 1 markets, due to their higher populations, present the opportunity for much greater revenue streams to offset initial costs. The potential for greater returns may lead to increased financing and outside investment opportunities. Therefore, Tier 1 markets might allow entrepreneurs to generate business models that, as a whole, are both more favorable and more feasible than Tier 2 markets.

Moreover, by balkanizing the existing 30 MHz blocks into 10 MHz sub-blocks, the Commission facilitates extension of the present mobile wireless market structure. At best, the Commission's proposal increases the post-auction transaction costs of assembling sufficient spectrum to compete with incumbents. Thus, the end result is likely to be that the C block of PCS spectrum will not be used to add another national competitor. Rather, it would serve merely as a means for incumbents to enlarge existing spectrum holdings. Clearly, this was not Congress' intent when it authorized the auctions and sought assurances of market diversity.

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<sup>12</sup> Id. at ¶ 30.

### III. POTENTIAL BIDDERS SHOULD BE FULLY INFORMED OF THE RISKS OF PARTICIPATION IN THE C AND F BLOCK REAUTION.

If the Commission elects to disregard the uncertainties that place the proposed reaution at risk, and instead proceeds with the reaution, it should protect the interests of potential bidders by informing them that their continued possession of licenses awarded via the reaution is conditioned on the outcome of pending appeals. The Commission has previously recognized that awards of contested permits or licenses at auctions during pending judicial appeals over their status are conditioned upon the outcomes of such appeals. In a proceeding to auction a direct broadcast satellite license, the Commission made clear that pending litigation could affect final licensing, irrespective of auction results. It stated that,

[i]n the unlikely event that a court either overturns our Advanced Order and ACC's construction permit with its associated orbital/channel authorizations is ultimately reinstated, or overturns this rulemaking and the Continental reassignment methodology is ultimately maintained, we would rescind any permit awarded through the auction process, and move with all deliberate speed to refund money paid up to that point. *Participants in the auction are hereby put on notice of this possibility, and should be willing to facilitate that process if it becomes necessary.*<sup>13</sup>

Similarly, the Commission should maintain its previous posture on contingency conditions, and clearly inform any reaution bidders of the risk attached to the C block licenses under appeal.

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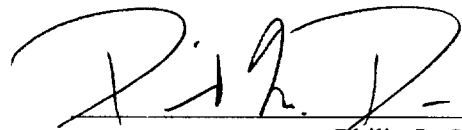
<sup>13</sup> Revision of Rules and Policies for the Direct Broadcast Satellite Service, IB Docket No. 95-168, *Report and Order*, 11 FCC Rcd 9712 at ¶ 152 (1995) (emphasis added).

#### **IV. CONCLUSION**

For these reasons, NextWave respectfully requests that the Commission act consistent with the proposals made in these Comments.

Respectfully submitted,

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